Nos. 14-556, 14-562, 14-571, 14-574

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

JAMES OBERGEFELL, *et al.*, and
BRITTANI HENRY, *et al.*, *Petitioners,*
v.
RICHARD HODGES, DIRECTOR, OHIO
DEPARTMENT OF HEALTH, *et al.*, *Respondents.*

VALERIA TANCO, *et al.*, *Petitioners,*
v.
WILLIAM EDWARD "BILL" HASLAM,
GOVERNOR OF TENNESSEE, *et al.*, *Respondents.*

APRIL DEBOER, *et al.*, *Petitioners,*
v.
RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*, *Respondents.*

GREGORY BOURKE, *et al.*, and
TIMOTHY LOVE, *et al.*, *Petitioners,*
v.
STEVE BESHEAR, GOVERNOR OF KENTUCKY, *et al.*, *Respondents.*

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* COLUMBIA LAW SCHOOL SEXUALITY AND GENDER LAW CLINIC IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The **Columbia Law School Sexuality and Gender Law Clinic** (the Clinic or *Amicus*), founded in 2006, is the first such clinical law program at an American law school.[1] The Clinic has extensive expertise in the constitutional doctrine related to marriage and family recognition. In fact, the Clinic has previously submitted *amicus* briefs on issues related to due process and marital choice to the Sixth Circuit in the instant case, the First Circuit in *Conde-Vidal v. Rius-Armendariz*, No. 14-2184 (1st Cir. filed Nov. 13, 2014), the Fourth Circuit in *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), the Fifth Circuit *De Leon v. Abbott*, No. 14-50196 (5th Cir. argued Jan. 9, 2015), the Seventh Circuit in *Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014), the Ninth Circuit in *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014), and the Eleventh Circuit in *Brenner v. Armstrong*, Nos. 14-14061, 14-14066 (11th Cir. filed Sept. 5, 2014).

The Clinic has also submitted *amicus* briefs in numerous other cases seeking to end the exclusion of same-sex couples from marriage and the exclusion of same-sex couples' marriages from legal recognition

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[1] All parties have consented to the filing of this *amicus curiae* brief pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court. No counsel for a party authored this brief in whole or in part, and no one other than *amicus*, its members, or its counsel made any monetary contribution toward the brief's preparation or submission.

including *United States v. Windsor*, 133 S. Ct. 2675 (2013), and *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013), and before state supreme courts in California in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), Connecticut in *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008), and Iowa in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

The Clinic's interest here is in addressing the relation between state laws governing marriage and the U.S. Constitution's due process guarantee – and in particular, the ways in which states generally avoid restricting individuals' choice of spouse. As this *amicus* brief shows, the protection of individual decisionmaking in matters as personally important as marriage is reflected in marriage statutes and case law throughout the country. This body of law imposes few restrictions, apart from the ones at issue here, on adults' choice of marital partners and on the recognition of valid marriages.

The laws of the states at issue here stand out, by contrast. They, along with the laws of a small group of other states, impose a singular, categorical and constitutionally impermissible burden on lesbians and gay men who seek to exercise their fundamental right to marry their chosen partner and to have that marriage recognized.

SUMMARY OF ARGUMENT

Marriage laws in Kentucky, Michigan, Ohio, Tennessee, and the nine other states that exclude same-sex couples from marriage and marriage recognition are largely consistent with the Due Process Clause of the U.S. Constitution, U.S. Const. amend. XIV, § 1, which protects "freedom of choice" in marriage, as this Court has recognized repeatedly. That is, these states' domestic relations frameworks generally take pains not to restrict individuals' ability to marry the person of their choice. They likewise impose few restrictions on the conduct and choices of married couples, other than forbidding abuse. Similarly, no state requires or even suggests distinct roles for male and female spouses within a marriage.

Matters stand otherwise with respect to individuals who would choose a spouse of the same sex. Freedom of choice is absent here. *Laws constraining individuals from choosing a same-sex marital partner and having that marriage recognized thus exist in sharp contrast to states' otherwise pervasive respect for marital freedom of choice.* In doing so, they infringe the Constitution's long-settled protection against state interference in deeply personal decisions related to family life.[2]

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[2] *Amicus* endorses, but does not duplicate here, the Petitioners' arguments that state restrictions on marriage and marriage recognition for same-sex couples also violate the Constitution's equal protection guarantee.

ARGUMENT

I. States Generally Allow Freedom of Choice in Marriage, Consistent with the Due Process Clause, but for Their Selective Exclusion of Same-Sex Couples.

The constitutions, statutes and case law of Kentucky, Michigan, Ohio, Tennessee, and the nine other states that restrict same-sex couples from marriage and marriage-recognition (the "marriage-ban states"[3]) impose few burdens on the "freedom of choice" in marriage that this Court has deemed to be fundamental under the Due Process Clause. *See generally Moore v. East Cleveland*, 431 U.S. 494, 499 (1977); *Loving v. Virginia*, 388 U.S. 1, 10-12 (1967). Their

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[3] As of the filing of this brief, these states include: Arkansas, *see* Ark. Const. amend. LXXXIII; Ark. Code Ann. §§ 9-11-107, 9-11-109, 9-11-208 (West 2014); Georgia, *see* Ga. Const. art. I, § 4, ¶ I; Ga. Code Ann. § 19-3-3.1 (West 2014); Kentucky, *see* Ky. Const. § 233A; Ky. Rev. Stat. Ann. §§ 402.005, 402.020, 402.040, 402.045 (West 2014); Louisiana, *see* La. Const. art. XII, § 15; La. Civ. Code Ann. arts. 89, 96, 3520 (West 2014); Michigan, *see* Mich. Const. art. I, § 25; Mich. Comp. Laws Ann. §§ 551.1, 551.271, 551.272 (West 2014); Mississippi, *see* Miss. Const. art. XIV, § 263A; Miss. Code Ann. § 93-1-1 (West 2014); Missouri, *see* Mo. Const. art. I, § 33; Mo. Ann. Stat. § 451.022 (West 2014); Nebraska, *see* Neb. Const. art. I, § 29; North Dakota, *see* N.D. Const. art. XI, § 28; N.D. Cent. Code Ann. § 14-03-01 (West 2013); Ohio, *see* Ohio Const. art. XV, § 11; Ohio Rev. Code Ann. § 3101.01 (West 2014); South Dakota, *see* S.D. Const. art. XXI, § 9; S.D. Codified Laws §§ 25-1-1, 25-1-38 (West 2014); Tennessee, *see* Tenn. Const. art. XI, § 18; Tenn. Code Ann. § 36-3-113 (West 2014); and Texas, *see* Tex. Const. art. I, § 32; Tex. Fam. Code Ann. §§ 2.001, 6.204 (West 2013).

restrictions on choice of a same-sex spouse defy this otherwise pervasive freedom.

A. The Marriage-Ban States Impose Few Limits on a Person's Choice of Spouse, Other Than the Choice of a Same-Sex Spouse at Issue Here.

Apart from the restrictions challenged in this case, the domestic relations law of Kentucky, Michigan, Ohio, Tennessee, and the other marriage-ban states prohibits marriage only when one or both partners is currently married or lacks the capacity to consent, or when the partners are related to a specified degree by blood or marriage. *See, e.g.*, Ky. Rev. Stat. Ann. § 402.020(1)(b) (bigamy); *id.* § 402.020(1)(f) (age of consent); *id.* § 402.010 (consanguinity); Mich. Comp. Laws Ann. §§ 551.3-551.4 (consanguinity); *id.* § 551.5 (bigamy); *id.* § 551.2 (capacity to consent); *id.* §§ 551.51, 551.103 (age of consent); Ohio Rev. Code Ann. § 3101.01 (bigamy, age of consent, consanguinity); Tenn. Code Ann. § 36-3-101 (consanguinity); *id.* § 36-3-102 (bigamy); *id.* § 36-3-104 to 36-3-107 (age of consent); *id.* § 36-3-109 (capacity to consent); *Seabold v. Seabold*, 84 N.E.2d 521, 523 (Ohio Ct. App. 1948) (capacity to consent); *see also, e.g.*, Tex. Fam. Code Ann. § 2.101 (age of consent); *id.* § 6.201 (consanguinity); *id.* § 6.202 (bigamy).

Parental consent is typically required for anyone age sixteen or seventeen. *See, e.g.*, Ky. Rev. Stat. Ann. § 402.020(1)(f) (requiring parental consent); Mich.

Comp. Laws Ann. § 551.103 (same); Tenn. Code Ann. §§ 36-3-104 to 36-3-107 (same); *see also, e.g.*, La. Child. Code Ann. art. 1545 (same). *Cf.* Ark. Code Ann. § 9-11-102 (providing minimum marriage age of seventeen for men and sixteen for women, and setting out consent requirements); Ohio Rev. Code Ann. § 3101.01(A) (providing minimum marriage age of eighteen for men and sixteen for women, and setting out consent requirements).

States generally also forbid marriage for those under sixteen years old. *See, e.g.*, Ky. Rev. Stat. Ann. § 402.020(1)(f)(1) (generally barring marriages between individuals younger than sixteen); Mich. Comp. Laws Ann. § 551.103 (same); Ohio Rev. Code Ann. § 3101.01 (same); Tenn. Code Ann. § 36-3-105 (same); *see also, e.g.*, Ga. Code Ann. § 19-3-2 (same); N.D. Cent. Code Ann. § 14-03-02 (same); S.C. Code Ann. § 20-1-100 (same); Tex. Fam. Code Ann. § 2.102 (same).

Even these restrictions, however, are waivable under certain circumstances. *See, e.g.*, Ky. Rev. Stat. Ann. § 402.020(1)(f)(3) (setting out exception to minimum-age restriction based on pregnancy); Mich. Comp. Laws Ann. § 551.201 (providing exception with parental consent); Ohio Rev. Code Ann. § 3101.04 (setting out pregnancy exception); Tenn. Code Ann. § 36-3-107 (allowing for waiver of minimum age requirements); *see also, e.g.*, Miss. Code Ann. § 93-1-5(d) (allowing waiver of minimum age requirements); Tex. Fam. Code Ann. §§ 2.102-2.103 (same).

In other words, in the marriage-ban states, an unmarried person who is at least eighteen years old and has the capacity to consent can marry any other consenting adult who is not a relative, and have that marriage recognized – so long as the chosen partner is also not of the same sex. *See supra.*

The four states in the instant case as well as other marriage-ban states, like every other state, thus impose few restrictions on the "freedom of personal choice in matters of marriage" guaranteed by the U.S. Constitution's Due Process Clause. *See* U.S. Const. amend. XIV, § 1; *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974); *see also Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (stressing that "freedom of choice" is a "fundamental" aspect of marriage).

This Court has reinforced that states should not limit an individual's choice of spouse outside of baseline concerns related to consanguinity, minimum age, bigamy, and consent. "[T]he regulation of constitutionally protected decisions, such as . . . whom [a person] shall marry, must be predicated on legitimate state concerns other than disagreement with the choice the individual has made." *Hodgson v. Minnesota*, 497 U.S. 417, 435 (1990); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984) ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse. . . ."); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684-85 (1977) ("[I]t is clear that among the decisions that an individual may make without unjustified government

interference are personal decisions 'relating to marriage. . . .'") (citations omitted); *Loving*, 388 U.S. at 12 ("Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

Consistent with these holdings, numerous lower courts have determined that this constitutional protection encompasses an individual's choice of a same-sex partner. In *Bostic v. Schaefer*, 760 F.3d 352, 376 (4th Cir.), *cert. denied*, 135 S. Ct. 308 (2014), for example, the Fourth Circuit explained that the fundamental right to marry "is not circumscribed based on the characteristics of the individuals seeking to exercise that right." The court added: "If courts limited the right to marry to certain couplings, they would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice instead." *Id.* at 377. The Tenth Circuit likewise observed that "surely a great deal of the dignity of same-sex relationships inheres in the loving bonds between those who seek to marry and the personal autonomy of making such choices." *Kitchen v. Herbert*, 755 F.3d 1193, 1214 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *see also, e.g., Bishop v. Smith*, 760 F.3d 1070, 1080 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014) ("State bans on the licensing of same-sex marriage significantly burden the fundamental right to marry. . . ."); *De Leon v. Perry*, 975 F. Supp. 2d 632, 657 (W.D. Tex. 2014) ("While Texas has the 'unquestioned authority' to regulate and define marriage, the State must nevertheless do so in a way that does not infringe on an individual's constitutional

rights.") (quoting *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013)), *appeal docketed sub nom. De Leon v. Abbott*, No. 14-50196 (5th Cir. argued Jan. 9, 2015).

Of course, like every state, Kentucky, Michigan, Ohio, Tennessee, and the other marriage-ban states have rules in place regarding the solemnization of marriages. *See, e.g.*, Ky. Rev. Stat. Ann. § 402.050(1) (indicating who can solemnize a marriage); Mich. Comp. Laws Ann. § 551.7 (same); *id.* § 551.9 (providing that "no particular form shall be required" to solemnize a marriage); Ohio Rev. Code Ann. § 3101.08 (identifying individuals authorized to solemnize a marriage); Tenn. Code Ann. § 36-3-301 (same); *id.* § 36-3-302 (providing that "no formula need be observed" in solemnization of marriage); *see also, e.g.*, Miss. Code Ann. § 93-1-17 (listing people able to solemnize a marriage); N.D. Cent. Code Ann. § 14-03-09 (same); S.D. Codified Laws § 25-1-30 (same); Tex. Fam. Code Ann. § 2.202 (same).

But these rules do not restrict individuals in their choice of spouse beyond the few eligibility requirements discussed *supra*. *See, e.g.*, Ohio Op. Atty. Gen. 69-051, May 27, 1969 (prohibiting probate courts from requiring IQ or other test to prove mental capacity or from refusing to issue a marriage license based on a party's inability to support a family). Even premarital blood test and medical examination requirements were repealed in the marriage-ban states long ago. *See, e.g.*, Ky. Rev. Stat. Ann. §§ 402.120-.170 (repealed in 1982); Mich. Comp. Laws Ann. §§ 551.151-.154 (repealed in 1978); Ohio Rev. Code

Ann. § 3101.05 (repealed in 1981); Tenn. Code Ann. §§ 36-3-201, 36-3-210 (repealed in 1985); *see also, e.g.*, 1 Tex. Prac. Guide Fam. Law § 2:49 ("Medical examinations and blood testing are no longer required. . . .").

Against this backdrop, the rules at issue here, which disallow individuals from marrying the person of their choice and refuse recognition to individuals who chose to marry a same-sex partner, *see supra*, cut strikingly against the due process limitation on government interference with this intimate and personal choice.

B. Also Consistent with Due Process, States Do Not Prescribe Gender Roles for Married Couples.

There is little in the law of any state, including in the Sixth Circuit, specifying how spouses should behave within marriage; the few rules that do exist focus on violence and abuse, and all of those are gender-neutral. *See, e.g.*, Ky. Rev. Stat. Ann. § 403.720(1) (defining "domestic violence and abuse"); Mich. Comp. Laws Ann. § 400.1501(d)(i)-(iv) (defining "domestic violence"); Ohio Rev. Code Ann. § 3113.31 (same); Tenn. Code Ann. § 36-3-601(4) (defining "domestic abuse"); *id.* § 39-13-111 (criminalizing "domestic assault"); *see also, e.g.*, Miss. Code Ann. § 93-21-3(a) (defining "abuse"); S.D. Codified Laws § 25-10-1(1) (defining "domestic abuse"); Tex. Fam. Code Ann. § 71.004 (defining "family violence").

Statutes governing divorce and child support similarly do not differentiate between male and female spouses. *See, e.g.*, Ky. Rev. Stat. Ann. § 403.170 (divorce); *id.* § 403.211 (child support); Mich. Comp. Laws Ann. § 552.6(1) (divorce); *id.* § 552.16(1) (child support); Ohio Rev. Code Ann. § 3105.01 (divorce); *id.* § 3119.02 (child support); Tenn. Code Ann. § 36-4-101 (divorce); *id.* § 36-5-101(a)(1) (child support); *see also, e.g.*, Miss. Code Ann. § 93-5-23 (child support and alimony); N.D. Cent. Code Ann. § 14-09-08 (child support); S.D. Codified Laws § 25-4-41 (spousal support); Tex. Fam. Code Ann. §§ 6.001-.008 (divorce); *id.* § 154.001 (child support).

Indeed, states within and outside of the Sixth Circuit generally permit spouses to craft agreements that define the terms of their marriage so long as the agreements "have been entered into . . . freely, knowledgeably and in good faith and without exertion of duress or undue influence upon either spouse." *See* Tenn. Code Ann. § 36-3-501 (allowing prenuptial agreements); Mich. Comp. Laws Ann. § 557.28 (prenuptial); Ohio Rev. Code Ann. § 2106.22 (prenuptial); *id.* § 3103.05 (postnuptial); *Hardesty v. Hardesty Ex'r*, 34 S.W.2d 442 (Ky. 1931) (prenuptial); *Campbell v. Campbell*, 377 S.W. 93 (Ky. 1964) (postnuptial); *Hodge v. Parks*, 844 N.W.2d 189, 195 (Mich. Ct. App. 2014) (postnuptial); *Bratton v. Bratton*, 136 S.W.3d 595, 600 (Tenn. 2004) (postnuptial); *see also, e.g.*, Ark. Code Ann. § 9-11-403 (prenuptial); N.D. Cent. Code Ann. § 14-03.2-01 (prenuptial); S.D. Codified Laws § 25-2-18 (prenuptial); Tex. Fam. Code Ann. § 4.003(a)(8), (b)

(prenuptial); *id.* § 4.102 (postnuptial). *But see* Ohio Rev. Code Ann. § 3103.06 (restricting marital partners from contracting to alter their legal relations).

C. States Further Protect Marital Choice by Limiting Annulment and Recognizing Marriages Even Where Spouses Had Dubious Motives.

States also strictly limit the circumstances in which marriages can be annulled, reinforcing that parties exercise nearly complete autonomy when choosing marital partners, for better or worse. *See, e.g.*, Ky. Rev. Stat. Ann. § 402.030 (permitting annulment where spouse is underage only if sought by the underage spouse or another acting on the underage spouse's behalf); Mich. Comp. Laws Ann. § 552.2 (same); Ohio Rev. Code Ann. § 3105.31 (same); Tenn. Code Ann. § 36-3-105 (same); *see also, e.g.*, Ark. Code Ann. § 9-12-201 (detailing limited grounds available for annulment); Ga. Code Ann. § 19-4-1 (prohibiting annulment where children are born of marriage); Tex. Fam. Code Ann. §§ 6.101-.111 (restricting annulment to situations, including, *inter alia*, an underage spouse who lacked parental consent or a court order; fraud, incapacity, and nondisclosed divorce); *cf.* Ohio Rev. Code Ann. § 3105.31 (discussing additional limited grounds for annulment, including bigamy, mental incapacity, and fraud); 15 Ky. Prac. Domestic Relations L. §§ 10:1-:7 (same); Mich. Civ. Jur. Marriage §§ 31-37 (same); W. Walton Garrett, 19 Tenn.

Prac. Tenn. Divorce, Alimony & Child Custody § 1:7 (2013 ed.) (same).

As a result, nearly all marriages – including those entered into under circumstances that would offend many Americans and those that contravene state law, other than bigamous or closely consanguineous marriages – are treated as presumptively valid. *See, e.g.*, *Robinson v. Commonwealth*, 212 S.W.3d 100, 104-06 (Ky. 2006) (holding that marriage between 37-year-old and 14-year-old was valid ("voidable, not void") and rejecting statutory rape charge on that ground); *Savini v. Savini*, 58 So. 2d 193 (Fla. 1952) (treating a marriage as valid and holding that a wife was entitled to divorce, but not annulment, where her husband deliberately concealed prior to marriage that he had been convicted of rape and was on parole). Courts also regularly decline to void marriages between first cousins that would not be permitted under state law. *See, e.g.*, *In re Miller's Estate*, 214 N.W. 428 (Mich. 1927) (refusing to void a marriage between first cousins that would not have been allowed under state law); *Soley v. Soley*, 655 N.E.2d 1381 (Ohio Ct. App. 1995) (same).

States systematically conclude, as well, that the dubious motives of one or both spouses do not render a marriage invalid, underscoring their general commitment to non-interference with individuals' choice of spouse. *See, e.g.*, *In re Estate of Smallman*, 398 S.W.3d 134, 154 (Tenn. 2013) (holding that evidence suggesting that a woman who married her husband two weeks before he died was a "bad person" and a

"'gold digger'" could not be a proper basis for invalidating a marriage and that evidence about the husband's ill health did not establish his lack of consent); *Coulter v. Hendricks*, 918 S.W.2d 424, 425, 427 (Tenn. Ct. App. 1995), *appeal denied* (citations omitted) (observing that Tennessee will not annul marriages "entered into in jest"); *see also, e.g.*, *Adler v. Adler*, 805 So. 2d 952 (Fla. Dist. Ct. App. 2001) (disallowing annulment notwithstanding that the wife had lied about her previous marriages and that the husband would not have entered into the marriage had he been aware of her marital history); *Verhage v. Verhage*, No. 12-04-00309-CV, 2006 WL 1791565 *1 (Tex. App. 2006) (adjudicating a divorce, rather than annulment, where husband alleged that his "pen-pal wife" had defrauded him, abused him, and transmitted a sexual disease to him); *cf. Hawkins v. Hawkins*, 258 S.W. 962, 963 (Ky. 1924) (treating marriage as valid where one spouse had "no other motive in view in marrying [her husband] than to secure every ease, luxury, and comfort obtainable for herself and family and to give to her husband as little affection and pleasure and association as possible"); *Koebel v. Koebel*, 176 N.W. 552, 553 (Mich. 1920) (describing a spouse's motive for marriage as "purely a commercial one in which 'Dan Cupid' had no part").

D. Eligibility for Marriage in the United States Does Not Hinge on Spouses Being Able to Procreate Biologically.

Within the extensive body of state law just discussed, there is no procreation requirement associated with marriage – and there is no law supporting the position that eligibility to marry turns on a couples' capacity to have children biologically. A federal district court in Florida put the point sharply:

> Florida has never conditioned marriage on the desire or capacity to procreate. Thus individuals who are medically unable to procreate can marry in Florida. If married elsewhere, their marriages are recognized in Florida. The same is true for individuals who are beyond child-bearing age. And individuals who have the capacity to procreate when married but who voluntarily or involuntarily become medically unable to procreate, or pass the age when they can do so, are allowed to remain married. In short, the notion that procreation is an essential element of a Florida marriage blinks reality.

Brenner v. Scott, 999 F. Supp. 2d 1278, 1289 (N.D. Fla. 2014), *appeal docketed sub nom. Brenner v. Armstrong*, Nos. 14-14061, 14-14066 (11th Cir. Sept. 5, 2014).

Indeed, state domestic relations laws expressly recognize that married couples (as well as unmarried individuals and couples) have children in a range of ways and draw no legal distinction between children conceived by or adopted by their parents. A Tennessee

statute, for example, dedicates an entire part to establishing rules for "Parentage of Children Born of Donated Embryo Transfer," including that children have the same legal status regardless of whether their parents received medical assistance in conception. *See* Tenn. Code Ann. §§ 36-2-401 to -403. Ohio also recognizes that couples have children via "non-spousal artificial insemination" and embryo donation and has legislated to protect those parent-child relationships. *See* Ohio Rev. Code Ann. §§ 3111.88-.97. Likewise, Michigan sets out a statutory framework for inheritance by children conceived following a married couples' "utilization of assisted reproductive technology." *See* Mich. Comp. Laws Ann. § 700.2114(a). And the Kentucky Supreme Court has affirmed the state's allowance of parentage via surrogacy. *See Surrogate Parenting Assoc., Inc. v. Com. ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986); *see also, e.g.*, Tex. Fam. Code Ann. §§ 160.701-.707 (establishing rules for "Child[ren] of Assisted Reproduction").

All states also have long affirmed that adopted children have the same legal status as children conceived by their parents. *See, e.g.*, Ky. Rev. Stat. Ann. § 199.520 (providing for equal treatment of adopted and biological children); Mich. Comp. Laws Ann. § 710.60 ("After entry of the order of adoption, there is no distinction between the rights and duties of natural progeny and adopted persons. . . ."); Ohio Rev. Code Ann. § 3107.15 (same, with limited exceptions for adoptions of individuals age eighteen or older); *Meriwether v. Fourth & First Bank & Trust Co.*, 285

S.W. 34, 34 (Tenn. 1926) (rejecting challenge to an adoptive child's inheritance and holding that an adopted child has the same legal status as a "legitimate natural" child); *see also, e.g.*, Ark. Code Ann. § 9-9-215 (declaring adoption decree establishes "relationship of parent and child between petitioner and the adopted individual, as if the adopted individual were a legitimate blood descendant of the petitioner, for all purposes"); Tex. Fam. Code Ann. § 162.017(a) ("An order of adoption creates the parent-child relationship between the adoptive parent and the child for all purposes.").

This delinking of marriage and biological procreation is consistent with this Court's commentary on the due process protections governing marriage. As explained in *Turner v. Safley*, 482 U.S. 78, 95-96 (1987), marriage remains a fundamental right for individuals, such as prison inmates, who may never have the opportunity to "consummate" a marriage, much less have children within the marriage. While observing that "most inmates eventually will be released" and might have that opportunity, the Court did not limit the marriage right, or its recognition of marriage's important attributes, to those inmates. *Id.* at 96. Instead, *Turner* stressed that numerous other "important attributes of marriage remain . . . [even] after taking into account the limitations imposed by prison life." *Id.* Among these are "expressions of emotional support and public commitment . . . [as] an important and significant aspect of the marital relationship," along with "spiritual significance" and "the

receipt of government benefits . . . , property rights . . . , and other, less tangible benefits." *Id.* at 95-96.

II. The Marriage Restrictions at Issue Infringe Same-Sex Couples' Constitutionally Protected Liberty Interests in Family Integrity and Association.

As this Court has explained many times, the Constitution's due process and equal protection guarantees protect the freedom to marry as one among several "aspects of what might broadly be termed 'private family life' that are constitutionally protected against state interference." *Moore*, 431 U.S. at 536. Others identified by this Court include "personal decisions relating to . . . procreation, contraception, family relationships, child rearing, and education." *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

These kinds of decisions, like the decision to marry, are elemental to an individual's ability to "'define the attributes of personhood.'" *Id.* For this reason, numerous cases hold that "the Constitution demands . . . the autonomy of the person in making these choices." *Id.*; *see also, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[F]reedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.").

This Court has consistently held, too, that autonomy to choose how to structure one's family life must

be accessible to all rather than available only for those favored by the state. Two older decisions regarding the rights of parents to control their children's education, *Meyer v. Nebraska*, 262 U.S. 390, 396-97 (1923), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925), lay the groundwork for this proposition. These decisions make clear that due process jurisprudence is centrally concerned with guaranteeing equal access to fundamental associational rights, a commitment the Court has carried forward to the present.

In *Meyer*, this Court overturned a law that made it illegal to teach any language other than English to a student who had not yet completed eighth grade. Recognizing that the law's impact fell singularly on "'those of foreign lineage,'" *Meyer*, 262 U.S. at 398 (quoting the decision below, *Meyer v. State*, 107 Neb. 657, 662 (1922)), the opinion stressed that "[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." *Id.* at 401.

Pointedly, the fundamental associational right to "establish a home and bring up children" had to be available on an equal basis to the country's newest inhabitants as well as to its longtime residents. *Id.* at 399. Equal access to this associational right outweighed the state's proffered interest in establishing English as the primary language, *id.* at 401, even though that interest was surely central to American life at that time.

In *Pierce*, this Court likewise overturned on due process grounds a law that required all children to attend public schools because the law "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. at 534-35. In this case, the targets were religious minorities – specifically, Roman Catholics – who maintained that the law "conflict[ed] with the right of parents to choose schools where their children will receive appropriate mental and religious training." *Id.* at 532. The states' refusal to allow those parents equal access to the right to decide how their children would be educated offended the "fundamental theory of liberty." *Id.* at 535.

Addressing a different type of restriction on familial choices, this Court similarly struck down a state-imposed fee to appeal terminations of parental rights because that fee unequally burdened indigent persons' associational right to be parents. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 127 (1996). *M.L.B.* recognized that "'[d]ue process and equal protection principles converge'" when state action restricts individual choices related to family formation. *Id.* at 120. The fee requirement "fenc[ed] out would-be appellants based solely on their inability to pay core costs," *id.*, violating the core principle that where a fundamental liberty interest is involved – such as the integrity of the parent-child relationship – the state must provide "'equal justice'" to all. *Id.* at 124 (quoting *Griffin v. Illinois*, 351 U.S. 12, 24 (1956)).

Same-sex couples and their deeply personal decisions about how to build a family life together are no exception to this rule. In *Lawrence*, 539 U.S. 558, this Court relied on due process to strike down a law that restricted gay people's associational freedom to make personal choices about sexual intimacy. By holding that "the substantive guarantee of liberty" may not be infringed for individuals who choose same-sex partners any more than it can be infringed for heterosexual couples, *Lawrence* affirmed that the due process guarantee protects individuals' ability to exercise their fundamental rights on an equal basis with others. *Id.* at 575. As the Court explained, "[p]ersons in a homosexual relationship may seek autonomy . . . just as heterosexual persons do" for "'the most intimate and personal choices a person may make in a lifetime.'" *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

III. The Due Process and Equal Protection Guarantees Require Equal Access to Fundamental Rights, Including Autonomy in Decisions about Childrearing, Intimacy, and Whom to Marry.

Arguments that the instant cases implicate a "new" right to marry a person of the same sex, rather than the fundamental right to marry a person of one's choice, ignore the extent to which fundamental rights are defined by what conduct they protect, not by *who* can exercise them. If fundamental rights could be redefined so easily and superficially, the Constitution's insistence on equal and fair access to those rights

would be eviscerated – states could restrict a group's exercise of a fundamental right and then characterize the right as one available only to those not similarly burdened.

Refashioning the right at issue in any of the Court's familial-choice due process cases just discussed makes clear how unworkable this proposition is. *Meyer*, for example, was not based on a fundamental right of Germans to raise their children in their own tradition but rather on a general liberty interest of all parents in choosing how their children will be raised. *Pierce* did not describe a fundamental right to parent in a Catholic fashion, but rather a general liberty interest of all parents to choose how their children are educated.

Likewise, *Turner* was not a case about "prisoner marriage" any more than *Loving* was about a fundamental right to "interracial marriage." Instead, these cases were about the fundamental right to marry. *Cf. Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, . . . a harmony in living, . . . a bilateral loyalty.").

Indeed, *Lawrence* directly corrected a similar rights-framing error in *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had characterized the plaintiff as seeking protection for "a fundamental right to engage in homosexual sodomy." *Id.* at 191. *Lawrence* rejected that description as a mischaracterization of the right

at issue. It held, instead, that defendants Lawrence and Garner sought protection of their fundamental right to "the autonomy of the person" to make "'the most intimate and personal choices . . . [that are] central to personal dignity and autonomy . . . [and] to the liberty protected by the Fourteenth Amendment.'" *Lawrence*, 539 U.S. at 574 (quoting *Casey*, 505 U.S. at 851). That liberty right could not properly be understood as defined by the sex or sexual orientation of the parties who sought to exercise it.

Likewise, the speculation that heterosexual couples might stop valuing marriage if gay and lesbian couples can marry rests on the similarly impermissible reasoning that a fundamental right can be denied to some based on the preferences of others. Indeed, that reasoning is uncomfortably akin to justifications offered for racially restrictive covenants nearly a century ago. "It is said that such acquisitions [of property] by colored persons depreciate property owned in the neighborhood by white persons." *Buchanan v. Warley*, 245 U.S. 60, 82 (1917).

In *Buchanan*, this Court rejected this absurdly speculative devaluation rationale in a manner that applies similarly to the instant case: "[P]roperty [marriage] may be acquired by undesirable white [heterosexual] neighbors or put to disagreeable though lawful uses with like results." *Id.*

In short, conditioning one group's access to a fundamental right based on the preferences or actions of another is wholly contrary to the longstanding

doctrine, just discussed, that recognizes the central importance of these rights.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Sixth Circuit and permanently enjoin the laws at issue as unconstitutional.

Respectfully submitted,

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